

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	4:06CR3014
)	
Plaintiff,)	
)	
v.)	MEMORANDUM
)	AND ORDER
)	
LAANTHONY CLETAE CAIN,)	
)	
Defendant.)	

On December 30, 2008, the court entered a memorandum and order (filing [75](#)) and a judgment (filing [76](#)) denying the defendant's motion to vacate, set aside, or correct his sentence pursuant to [28 U.S.C. §2255](#) (filing [73](#)). On March 9, 2009, after the defendant filed a notice of appeal (filing [88](#)), the court entered a memorandum and order (filing [88](#)) which denied the defendant a certificate of appealability but permitted him to proceed in forma pauperis on appeal. On July 7, 2009, the Court of Appeals also denied the defendant a certificate of appealability and dismissed his appeal (filing [96](#)). On December 29, 2009, the defendant filed a Rule 60(b) motion (filing [116](#)). The motion was denied on January 8, 2010 (filing [117](#)), following which the defendant filed another notice of appeal (filing [120](#)). On March 30, 2010, the court again denied the defendant a certificate of appealability while permitting him to proceed in forma pauperis on appeal (filing [123](#)). The Court of Appeals summarily affirmed on June 1, 2010 (filing [126](#)).

On December 24, 2010, the defendant filed a second Rule 60(b) motion (filing [131](#)). The motion was denied on January 6, 2011 (filing [133](#)). On January 21, 2011, the defendant filed a Rule 59(e) motion (filing [135](#)) to challenge the denial of the Rule 60(b) motion. The Rule 59(e) motion was denied on January 28, 2011 (filing [136](#)). On February 25, 2011, the defendant filed a notice of appeal (filing [141](#)).

regarding the court's orders of January 6 and January 28.¹ The defendant also filed a motion for leave to proceed in forma pauperis on appeal (filing [142](#)).

In his first Rule 60(b) motion, the defendant claimed that the court had erred by denying leave to amend his § 2255 motion. As has been previously explained, the motion was denied *without prejudice* because the defendant failed to identify the proposed amendments and the court was unwilling to assist the defendant's attempt to avoid the statute of limitations by seeking an open-ended opportunity to amend. The Rule 60(b) motion was denied because the defendant failed to make an adequate showing of exceptional circumstances for granting any relief. While claiming that the court's denial of the motion for leave to amend the § 2255 motion was the result of "mistake, inadvertence, surprise, or excusable neglect," *see* [Fed.R.Civ.P. 60\(b\)\(1\)](#), the defendant failed to make any legitimate showing to support this claim.

In his second Rule 60(b) motion, the defendant argued that the court had erred in denying his § 2255 motion by failing to give proper consideration to his Fifth and Sixth Amendment claims. The defendant expanded upon these arguments in his Rule 59(e) motion and revisited his argument that he should have been allowed to amend the § 2255 motion. Both filings amounted to successive motions for postconviction relief which cannot be filed without prior authorization from the Court of Appeals under [28 U.S.C. §§ 2244](#) and [2255\(h\)](#). *See* [United States v. Lambros](#), 404 F.3d 1034, 1037 (8th Cir. 2005) (per curiam) (denying certificate of appealability following district court's denial of Rule 60(b) and 59(e) motions, and dismissing appeal).

¹ The clerk's office has issued a memo stating that the notice of appeal "appears to be untimely, but within the 30-day period for extension of time for excusable neglect or good cause per Federal Rule of Appellate Procedure 4(b)(4)." (Filing [143](#).) Although this is a criminal case, the Federal Rules of Civil Procedure govern § 2255 motions. *See* [United States v. Harrison](#), 469 F.3d 1216, 1217 (8th Cir. 2006). The time allowed for filing a notice of appeal from a judgment or order in a civil case where the United States is a party is 60 days. *See* [Fed.R.App.P. 4\(a\)\(1\)\(B\)](#).

Before the defendant's appeal can proceed, a certificate of appealability must issue. See *id.*; [Fed. R. App. P. 22\(b\)](#). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." [28 U.S.C. § 2253\(c\)\(2\)](#). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 motion, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" in order to meet the standard contained in § 2253(c). [Slack v. McDaniel, 529 U.S. 473, 484 \(2000\)](#). In contrast, when a district court denies a § 2255 motion on procedural grounds without reaching the applicant's underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when "the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

For the reasons explained above, and in the court's previous memoranda and orders, it is apparent that the defendant "has not made a substantial showing of any error, much less constitutional error." [Lambros, 404 F.3d at 1037](#). Consequently, a certificate of appealability will not be issued in connection with Cain's most recent notice of appeal.

Cain was determined to be financially unable to obtain an adequate defense in his criminal case, and an attorney was appointed to represent him at trial. Because the appeal appears to be taken in good faith, even though a certificate of appealability will not be issued, the defendant may proceed in forma pauperis on appeal pursuant to [Federal Rule of Appellate Procedure 24\(a\)\(3\)](#).

Accordingly,

IT IS ORDERED:

1. In response to the clerk's memo (filing [143](#)), because the defendant's notice of appeal (filing [141](#)) appears timely, no "excusable neglect" ruling will be made.
2. A certificate of appealability will not issue in this § 2255 proceeding.
3. The defendant's motion for leave to proceed in forma pauperis on appeal (filing [142](#)) is granted.
4. The clerk of the court shall transmit a copy of this memorandum and order to the United States Court of Appeals for the Eighth Circuit.

March 7, 2011.

BY THE COURT:

Richard G. Kopf
United States District Judge